interbrand competition is relevant in a vertical case, it has never been a defense where horizontal competitors agree not to compete. *General Motors* involved purely intrabrand competition among Chevrolet dealers. In *Topco*, the district court had refused to apply the *per se* rule on the very ground urged here by respondent: eliminating intrabrand competition in Topco products would promote interbrand competition with national brand supermarket chains. *United States v. Topco*, 319 F.Supp. 1031, 1038 (N.D. Ill. 1970). This Court rejected the rule of reason because the intrabrand competitors were acting horizontally at the same market level. 405 U.S. at 608. *Accord, United States v. Sealy, Inc.*, 388 U.S. 350 (1967).

Respondent argues that *General Motors* and *Topco* have been overruled, that *General Motors* was a price-fixing case, and that *Topco* depended on geographic markets. (at 9). It cites no authority for these propositions, which are patently without merit. That respondent must resort to such extreme arguments demonstrates how the opinion below conflicts with this Court's decisions and the importance to antitrust enforcement of granting the petition or summarily reversing.

General Motors has not been overruled, did not turn on a vertical restraint, and did not involve price-fixing in any sense more than is involved here. This Court continues to cite *General Motors* for the proposition that the *per se* standard applies in cases of horizontal agreements among competitors. *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 734 and n.5 (1988); *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 290 (1985). *General Motors* has been often and recently cited with approval for the proposition that a manufacturer's attempts to (i) induce horizontal competitors to act or (ii) help them enforce their agreements do not transform a horizontal agreement into a vertical one and make the *per se* standard inapplicable. *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 462 (3rd Cir. 1998);

Denny's Marina, Inc. v. Renfro Productions, Inc., 8 F.3d 1217, 1220 (7th Cir. 1993); *ES Development Inc. v. RWM Enterprises, Inc.*, 939 F.2d 547, 550 (8th Cir. 1991), *cert. denied*, 502 U.S. 1097 (1992).

Nor can *General Motors* be dismissed as a price-fixing case. While a purpose of the agreement was to eliminate sales by discounters and thereby reduce price competition from these discounters, this is no different than respondent's purpose here to eliminate "cutthroat competition." This is the obvious and presumed effect of any agreement to refuse to bid for the services or products of any suppliers. Fewer bids eliminates competition for supplies and puts the supplier at the mercy of the anointed conspirator as to price and otherwise.

Nor does *Topco* depend on geographic markets. Many cases in various circuits, cited by the amici or petitioners but ignored by respondent, apply the *per se* rule, reject respondent's reading of *Topco*, and demonstrate that this case creates a sharp split in the circuits. *United States v. Brown*, 936 F.2d 1042, 1045 (9th Cir. 1991), is identical to petitioners' case. It involved *no geographical division*, but competitors were convicted for agreeing not to bid on each other's accounts for one year after termination, although continuing to compete otherwise. *Accord, Hammes v. AAMCO Transmission, Inc.*, 33 F.3d 774, 782-83 (7th Cir. 1994)(no geographic division; intrabrand conspiracy among franchisees); *United States v. Suntar Roofing, Inc.*, 897 F.2d 469, 473 (10th Cir. 1990)(no geographic division); *United States v. Cooperative Theatres*, 845 F.2d 1367, 1773 (6th Cir. 1988)(no geographic division; competition for new customers continues); *Service Merchandise Co. v. Boyd Corp.*, 722 F.2d 945, 950 (1st Cir. 1983)(intrabrand competition).[9]

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[9]Respondent's procedural arguments about this case (at 11-12), are also without merit. The general agents are fierce competitors, and NML emphasizes their independence. The

II. THE QUICK LOOK STANDARD

Since this was a naked restraint on competition to purchase a supply of agent services, the court below should at least have carefully scrutinized the likely impact of allowing such a restraint versus the proferred justification. Instead, it allowed a mere hypothesis of benefit to substitute for actual proof and to impose on petitioners a full blown rule of reason analysis. The district court only looked at this matter "in passing." a56. Respondent repeats the unsubstantiated post-hoc rationalization that the restraint encourages general agents to better train subagents. a51. There was no evidence that *respondent* paid a single penny to train Bogan or Bogan's subagents or that the restraint had any causal effect upon such training.

The only benefit for which Hodgkins is arguing is the desire of a monopsonist to be free from competition which lowers profits by increasing costs. If the quick look rule is to continue to have vitality and not just be a meaningless theoretical exercise, it must require more than spinning economic theory without any facts and without testing facts against reality.[10]

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district court found they could conspire and that the Bogans suffered injury, a37-38, a54 and n. 22. The leading commentator and the cases have held employees and service providers may challenge such antitrust violations. *Areeda, Antitrust Law*, ¶377a, p. 311; *Anderson v. Shipowners' Ass'n, supra*; *Dailey v. Quality School Plan*, 380 F.2d 484 (5th Cir. 1967); *Roseland v. Phister Mfg. Co.*, 125 F.2d 417 (7th Cir. 1942); *see Roman v. Cessna Aircraft Co.*, 55 F.3d 542 (10th Cir. 1995).

[10]There is nothing inherent in the general agents's relationship which requires cooperation in recruiting agents or maintaining a competitive balance, and even such necessary cooperation was not enough to sustain the restraint in *N.C.A.A., supra.* Nor are there ethical issues as in professional asso-

Although the general agents' agreement is an explicit refusal to bid for services and an agreement to divide suppliers, respondent does not reconcile the holding below with *California Dental Assoc. v. F.T.C.*, _ U.S. _, 119 S.Ct. 1604 (1999), other decisions of this Court, and the conflict with other circuits cited at Pet. Mem. 21. If allowed to stand, the opinion below will emasculate the abbreviated analysis. A full rule of reason analysis will always be imposed instead of an abbreviated balancing of the immediate procompetitive benefits and the anticompetitive evils and a determination of whether there are less restrictive means for achieving the benefits. *Chicago Pro. Sports Ltd. Partnership v. NBA*, *supra*, 961 F.2d at 674; *see Sullivan v. NFL*, *supra*, 34 F.3d at 1103.

CONCLUSION

For the foregoing reasons, the petition should be granted.

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Respectfully submitted,

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ciation cases. Even those do not always justify the restraint. *Arizona v. Maricopa County Medical Soc.*, *supra*.